"If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure."

In the instant case there was, notwithstanding the first defendant's plea of guilty in the magistrate's court and the second defendant's admission to a former legal adviser of the plaintiff that the first defendant was driving at the request of the second defendant who wished her to "come into town to pick him up", good reason for setting aside the judgment in that the statement of claim was admittedly in error in its description as to how the accident occurred. It is possible that on hearing evidence on the facts as outlined to me that the plaintiff may have been, at least partially, to blame for the accident. That was why I set aside the judgment and imposed the somewhat stringent conditions I have already mentioned. Although I was at the time attracted by the persuasive argument of Mr. Choo that the plaintiff should have proceeded under Order 13 rule 13 I was not wholly convinced by it. I am now of the opinion that it was wrong and that Order 13 rule 13 is intended rather to cover cases where equitable remedies such as specific performance and the taking of accounts are sought.

Order accordingly.

Advocates: *Ibrahim, Chee & Co.; Hilborne, Hawkin & Co.*

MALAYSIAN REPORTS

SOM BINTI DAUD & ORS. v. NIK MUSTAFFA BIN NIK IDRIS & ORS.

[F.C. (Suffian L.P., Gill C.J. (Malaya) and Mohamed Zahir J.) June 5 and July 6, 1977]

[Kota Bharu — Federal Court Civil Appeal No. 176 of 1976]

Land Law — Inquiry by District officer — Possessory title given to parties — Appeal to High Court — Claim of superior title — Kelantan Land Settlement Ordinance, 1955, ss. 7, 10 and 16.

In this case the Enquiry officer had held an equiry under the Kelantan Land Settlement Ordinance, 1955. The Enquiry officer originally ordered the land to be registered in the name of the appellants, giving them absolute title. Subsequently on application by the respondents, the District Officer varied the order by giving possessory titles to the appellants and the respondents. The appellants appealed to the High Court which dismissed the appeal, whereupon the appellants appealed to the Federal Court.

Held: as the appellants claimed a title superior to the possessory title, they were entitled to bring an action under section 10 of the Kelantan Land Settlement Ordinance, 1955 and they should be allowed to do so.

Cases referred to:-

(1) *Deraman bin Din & Ors.* v. *Ibrahim bin Mamat* [1975] 1 M.L.J. 142.

(2) *Fatimah* v. *Wok* [1964] M.L.J. 318.

(3) *Deraman bin Din & Ors.* v. *Ibrahim bin Mamat* [1977] 1 M.L.J. 52.

The following case was also cited in argument: *Mat 'Ail* v. *Mek* [1961] M.L.J. 15.

FEDERAL COURT.

P. Dorairaj for the appellants.

Ahmad Rastom for the respondents.

Suffian L.P. (delivering the judgment of the Court, read by Mohamed Zahir J.): We dismissed this appeal, but at the same time gave liberty to the appellants to file suit under section 10 of the Kelantan Land Settlement Ordinance, 1955, and now give our reasons.

This is a dispute regarding a piece of land, Lot No. 1487 in the Mukim of Tepus, District of Bachok, in Kelantan.

There was an enquiry about it under the Kelantan Land Settlement Ordinance, 1955.

At the time of the enquiry the land was registered in the names of the appellants, five daughters of Haji Daud bin Merah ("Daud"). The enquiry officer ordered that the whole of the land be registered in the names of his five daughters, each daughter to have 1/5 undivided share. Obviously, the order was made under section 7, giving each daughter not possessory, but *absolute* title.

The five respondents, dissatisfied with the decision of the enquiry officer, appealed under section 16(1) to the District Officer. The District Officer, after hearing many witnesses, decided on June 29, 1975, to vary the enquiry officer's order as follows: he gave under section 8 each of the daughters possessory title in respect of 2/35 undivided share and each of the respondents also possessory title in respect of 5/35 undivided share.

The appellants, dissatisfied with the District Officer's decision, appealed to the High Court under section 16(1).

On November 25, 1976, the learned judge dismissed the appeal, whereupon the appellants appealed to us.

The land originally belonged to the late Sultan Ibrahim. On the death of the Sultan, it devolved to his daughter Tengku Petri. On September 7, 1968, when it was transferred to her by the Public Trustee the Administrator of the Estate of the Sultan, it was bought by Daud for his wife, Zainab, and on the same day it was registered in Zainab's name. The transaction was made at the District Office, Bachok, in front of the District Officer and others when the purchase price of $4,000 was paid to Tengku Petri. Four years and three months later, Zainab transferred it to her five daughters, the appellants, who became registered proprietors.

The five respondents lodged a complaint and subsequently an enquiry was held under the Kelantan Land Settlement Ordinance. They said that they had bought portions of the land at various times from various people.

The first respondent said that he had bought his portion in 1962, from Daud and one Mohamed.

The second respondent said that she had bought her portion between 1960 and 1962, from Daud and Mohamed.

The third respondent said that he had bought his portion on July 17, 1972, from Hassan.

The fourth respondent said that she had bought her portion in 1964, from Senik.

The fifth respondent said that she had bought her portion in 1968, from Daud and Mohamed.

Three things should be noted:

(1) some of the above transactions were alleged to have taken place before September 7, 1968, when the land in question came into the hands of Tengku Petri for her to dispose of;

(2) the Mohamed mentioned above is another Mohamed, not the third respondent; and

(3) according to the District Officer's decision the five appellants should have only possessory title, whereas they claimed that they should get absolute title and each as to 1/5 undivided share in the whole of the land.

In other words they claimed a title superior to possessory title. Under section 10 it would appear that as their claim existed before the registration of possessory title they could have brought action against the respondents, provided they sued within 3 years of the registration. But in view of the decision of the High Court in *Deraman*,[1] there was some doubt as to whether they could have done that, and that is why the appellants did not bring an action. Since then that decision had come before this court and in our judgment reported at [1977] 1 M.L.J. 52 it is clear that in circumstances like these the appellants could sue under section 10, since, as Ali F.J. said there, they claim title superior to possessory title, as the plaintiff did in *Fatimah* v. *Wok*.[2]

The two rival contentions are as follows.

The appellants contend that the land was sold by Tengku Petri to Daud alone, The respondents on the other hand contend that the land was sold by Tengku Petri to Daud and *Mohamed*. Tengku Petri herself in a letter dated June 25, 1975, addressed to the enquiry officer said that she sold it to Daud alone. If this were true, then those respondents who claim that they bought from other than Daud would have no case. In our judgment the best way of solving this dispute is by way of a full hearing before the High Court.

We do not think that this decision is inconsistent with our decision in *Deraman*.[3] There the issue was whether a person who has failed before the District Officer might sue under section 10 without first bothering to appeal under section 16 to the High Court. The trial judge held that he could not if he had appeared before the District Officer. In this court Ong F.J. agreed with him. Ali F.J., however, drew a clear distinction between a plaintiff who claimed possessory title and a plaintiff who claimed absolute title, and held that the former could not while the latter could. I did not draw that distinction and held that in either case the plaintiff could. In view of this, in so far as this appeal is concerned the plaintiff could and can sue, as he claims against the defendant who was awarded possessory title, a title superior to the registered possessory title.

This decision is also consistent with the Federal Court decision in *Fatimah* v. *Wok*[2] where also the plaintiff claimed absolute title against the defendant who had been awarded possessory title.

In conclusion we would like to say that, while we think that the dispute in this appeal is best resolved in a suit in the High Court after hearing and seeing all the witnesses, we do not, however, think that every appellant who has failed before the District Officer is entitled to sue under section 10, it being our opinion that the correct procedure is best determined in the light of the disputed facts in each particular case.

Order accordingly.

Solicitors: *P. Dorairaj; Rithauddeen & Aziz.*